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DePaul Law Review

Volume 10
Issue 1 *Fall-Winter 1960*

Article 26

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Recommended Citation

DePaul College of Law, *Federal Procedure - Federal District Court Can Transfer Action under Section 1404 (a) Only to District with Statutory Venue - Hoffman v. Blaski, Sullivan v. Behimer, 363 U.S. 335 (1960)*, 10 DePaul L. Rev. 204 (1960)
Available at: https://via.library.depaul.edu/law-review/vol10/iss1/26

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cases.[13] Another advocate for the abolition of the privilege is Professor Wigmore, who has stated:

> This privilege has no longer any good reason for retention. . . . [T]his marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.[14]

Thus the *Wyatt* case would seem to follow the view of those who propose a change in the rule of evidence concerning marital testimony.

[13] 63 A.B.A. REP. 594 (1938).

[14] 8 WIGMORE, EVIDENCE § 2228, at 232 (3d ed. 1940).

FEDERAL PROCEDURE–FEDERAL DISTRICT COURT CAN TRANSFER ACTION UNDER SECTION 1404 (a) ONLY TO DISTRICT WITH STATUTORY VENUE

Respondents Blaski and others were the original plaintiffs in a patent infringement action brought in the United States District Court for the Northern District of Texas against defendants, who were residents of the City of Dallas, where they maintained their only place of business and where the alleged acts of infringement occurred. Defendants moved, under section 1404(a) of the Judicial Code,[1] to transfer the action to the United States District Court for the Northern District of Illinois. They asserted that such transfer would be for the convenience of the parties and witnesses, in the interest of justice, inasmuch as litigation with regard to the same patent was already pending in the Illinois District Court between the same plaintiffs and other alleged infringers. At the time of filing their motion the defendants waived all objections to the venue of the Illinois District Court if their motion to transfer were granted.

The Texas District Court granted the motion over the objection of the plaintiffs who, relying on the specific venue section regarding civil actions for patent infringements,[2] insisted that the Illinois District Court was not a district "where the action might have been brought" within the meaning of section 1404(a). Plaintiffs' motion for leave to file a petition for a writ of mandamus directing the vacation of the transfer order was denied by the United States Court of Appeals for the Fifth Circuit.[3]

[1] 28 U.S.C.A. § 1404 (a) (Supp. 1959). Change of venue–"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[2] 28 U.S.C.A. § 1400 (b) (Supp. 1959). Patents and copyrights–"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

[3] *Ex parte* Blaski, 245 F. 2d 737 (5th Cir. 1957).

After the transfer to the Illinois District Court, the plaintiffs moved that court for an order to remand the action back to Texas on the ground that the Texas District Court was without power to issue the transfer order. Upon denial of that motion the plaintiffs once again petitioned—this time the United States Court of Appeals for the Seventh Circuit for a writ of mandamus directing the judge of the Illinois District Court to reverse his order denying re-transfer. This time the writ was granted,[4] with the result that the action was to be re-transferred to the Texas District Court. The Seventh Circuit Court held that the decision of the Fifth Circuit was erroneous on the ground that the Illinois District lacked venue over this action; it, therefore, was not a district where the "action might have been brought" within the meaning of section 1404(a). The Seventh Circuit further determined that it was not precluded from a re-examination of the meaning of the statutory phrase by the ruling of the Fifth Circuit.

A second case decided at the same time and presenting the same issue involved a derivative action brought by minority stockholders of a Utah corporation in the Illinois District Court against two Indiana corporations licensed to do and doing business in Illinois, for damages resulting from illegal acquisition by defendants of the assets of the Utah corporation.[5] The defendants moved under section 1404(a) to transfer the action to the United States District Court for the District of Utah, making the appropriate allegations[6] and waiving objections to the venue of the Utah District Court. The Illinois District Court granted the motion over the objections of the plaintiffs, who asserted that the Utah District lacked venue over the action[7] and that the defendants were not amenable to service of process in that district.[8] Thereupon the plaintiffs filed a petition for a writ of mandamus in the Court of Appeals for the Seventh Circuit,

[4] Blaski v. Hoffman, 260 F. 2d 317 (7th Cir. 1958), *cert. granted*, 359 U.S. 904 (1959).

[5] The jurisdiction of the federal court was based on diversity of citizenship.

[6] Defendants asserted that the Utah court would be more convenient because all the officers, directors, and most of the stockholders of the Utah corporation resided in that district; the books and records of the corporation were located in Utah; the law of Utah governed the action; and the docket of the Utah court was less congested than that of the Illinois court.

[7] Plaintiff invoked the venue section applicable to actions against corporations, which provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U.S.C.A. § 1391 (Supp. 1959). It was shown that defendants were neither incorporated in, nor licensed to do, nor doing business in Utah.

[8] FED. R. CIV. P. 4 (f) provides:

"(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held. . . ."

seeking a reversal of the District Court's transfer order. The writ was granted on the ground that the Utah District Court was not a forum where the action "might have been brought."[9]

The United States Supreme Court granted certiorari in both cases.[10] It upheld the decisions of the Seventh Circuit, affirming that court's interpretation of section 1404(a) that transfer is permitted for the convenience of the parties and witnesses, in the interest of justice, only to a district of statutory venue where the plaintiff has a *right* to bring the action over timely objections of the defendant. *Hoffman v. Blaski, Sullivan v. Behimer*, 363 U.S. 335 (1960).

The Supreme Court stated at the outset of its opinion in the instant cases that the petition for a writ of mandamus was the proper method to assail the validity of the transfer order.[11] The Court made the further preliminary observation that the Seventh Circuit was not bound by the order of the Fifth Circuit denying the petition for a writ of mandamus. It held the doctrine of res judicata not applicable to these orders, on the grounds that they were "(1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction."[12] In his dissent,[13] Mr. Justice Frankfurter expressed the opinion that the doctrine of res judicata should have precluded the Seventh Circuit from re-examining the legality of the transfer order. He relied in substance upon *Baldwin v. Iowa State Traveling Men's Ass'n*,[14] where the defendant corporation appeared specially to object to the court's jurisdiction on the ground of lack of personal service. After a hearing, the Missouri District Court in that case overruled the objection with leave to plead over. No plea having been filed within the required period, the cause proceeded and judgment was entered against the defendant corporation, who did not move to set it aside nor sue out a writ of error. The defendant was

[9] Behimer v. Sullivan, 261 F. 2d 467 (7th Cir. 1958).

[10] Blaski v. Hoffman, 260 F. 2d 317 (7th Cir. 1958), *cert. granted*, 359 U.S. 904 (1959); Behimer v. Sullivan, 261 F. 2d 467 (7th Cir. 1958), *cert. granted*, 361 U.S. 809 (1959).

[11] There is no dispute that an order granting or denying change of venue is not appealable since it is not a final decision within the meaning of 28 U.S.C.A. § 1291 (Supp. 1959), (which section provides for appellate jurisdiction of the courts of appeals). Furthermore, it is not controverted that such orders might be reviewed by circuit courts by way of entertaining a petition for a writ of mandamus. The basis for this power is the "all writs" section of the Judicial Code, 28 U.S.C.A. § 1651 (a) (Supp. 1959), whereby federal courts may issue all writs necessary "in aid of" their respective jurisdiction.

[12] Hoffman v. Blaski, 363 U.S. 335, 340 (1960).

[13] *Id.* at 345. Mr. Justice Harlan and Mr. Justice Brennan joined in the dissent.

[14] 283 U.S. 522 (1931).

thereafter held to be precluded by the doctrine of res judicata to collaterally attack that final judgment by again asserting that the court had no jurisdiction over the defendant. Mr. Justice Frankfurter was of the opinion that in the noted case the Seventh Circuit should have been guided by the principle propounded in the *Baldwin* case, that "public policy dictates that there be an end of litigation. . . ."[15] However, the legal characteristics of the judgment rendered in the *Baldwin* case are quite different from those of the transfer order under discussion. The neglect of the defendant corporation in the former case to take the available steps for a review of the decision of the lower court led to a final judgment on the merits. By comparison, the transfer order and the denial of a writ of mandamus by the Fifth Circuit did not become final decisions on the merits, but were merely interlocutory in nature as was shown above. The Fifth Circuit had no power to, nor did it purport to determine the question of jurisdiction of the Illinois District Court. That court was, therefore, not precluded from a determination of its own jurisdiction and could refuse to "accept the transfer" when it found the Texas District's interpretation of the statute to be erroneous. The holding of the majority that the doctrine of res judicata was inapplicable appears to be based on sound reasoning.

The principal problem presented by these cases involves the construction of the last phrase of section 1404(a) of the Judicial Code, whereby a district court may transfer a civil action for the convenience of parties and witnesses in the interest of justice to any other district *where it might have been brought.* The exact question raised was whether the last clause limits transfer to districts with proper statutory venue or whether the defendant may enlarge the number of forums by waiving objections to the venue of a non-statutory forum and by his consent to appear therein.

A look at the legislative history of the statute appears necessary in order to determine its proper construction. The section was drafted "in accordance with the doctrine of *forum non conveniens.*"[16] The origin of that doctrine is said to be obscure,[17] but there is no doubt that it has become a part of our judicial system.[18] It is based on the inherent powers possessed by every court of justice to "resist imposition upon its juris-

[15] *Id.* at 525.

[16] Reviser's Notes dealing with subsection (a) of § 1404 of 28 U.S.C.A., which states: "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. . . ."

[17] BLAIR, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COL. L. R. 1 (1929); BARETT, *The Doctrine of Forum Non Conveniens,* 35 CAL. L.R. 380 (1947).

[18] [T]he familiar doctrine of forum non conveniens as a manifestation "of a civilized judicial system is firmly embedded in our law. . . ." Baltimore and Ohio R.R. v. Kepner, 314 U.S. 44, 55–56 (1941) (dissenting opinion).

diction even when jurisdiction is authorized by the letter of a general venue statute."[19] The plea of *forum non conveniens* was available only to a defendant who could convince the court that a trial in the inconvenient forum would result in vexation and oppression, and that there was another more convenient forum where the plaintiff could properly bring the action. Upon the court's finding that the ends of justice would be better served by a trial in such other forum, the plaintiff's action was dismissed. The doctrine was first developed in the state courts, whereas the federal courts were held to be under a duty to exercise the granted power of jurisdiction, at least in cases at law.[20] However, in 1947 the United States Supreme Court held in the case of *Gulf Oil Corporation v. Gilbert*[21] that the doctrine of *forum non conveniens* was applicable in the federal courts in a suit at law for money damages. The Court emphasized that the plaintiff's choice of forum will only be disturbed if the balance of conveniences is strongly in favor of the defendant and if there is an alternative forum in which the plaintiff might proceed.[22] The courts exercised their discretion sparingly, inasmuch as a successful plea by the defendant led to a mandatory dismissal and deprived the plaintiff of his historical privilege of choice of forum. He was forced to commence his action in another court, which fact often caused great additional expense and sometimes even a loss of his claim by reason of the running of the statute of limitations.[23]

The harshness of this result was one of the principal reasons for the enactment of section 1404(a) of the Judicial Code[24] in 1948. That section now permits transfer of the action to a more convenient district where previously dismissal was the only answer to a plaintiff's choice of a harassing forum. The statutory provision has not codified the law of *forum non conveniens*, nor has it abrogated that doctrine. "When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification."[25] However, the application of the old doctrine is greatly limited, and is used mainly where the federal courts find that the action should rather be brought in a foreign country.[26] There are today, therefore, two branches which developed from the same root, and it seems justified to examine the "statutory branch" in the light of its history.

Prior to the decision rendered by the United States Supreme Court in the instant cases, there were many contradictory interpretations by the

[19] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

[20] BARETT, *supra* note 17 at 395.

[21] 330 U.S. 501 (1947).

[22] *Id.* at 506–7.

[23] *Id.* at 516.

[24] BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES, 121–22 (5th ed. 1949).

[25] Norwood v. Kirkpatrick, 349 U. S. 29 (1955).

[26] Editorial Note, 24 GEO. WASH. L. REV. 207, 214 (1955).

lower federal courts as to the meaning of the last phrase of section 1404(a), "where the action might have been brought." Some courts held[27] that these words limited transfer to districts of jurisdiction and statutory venue, while others thought[28] that general jurisdiction over the subject matter was the only statutory requirement as to the transferee forum. The courts taking the latter view held that a defendant who moved for transfer to a more convenient but non-statutory district could establish a proper venue by consenting to submit to the jurisdiction of such other district. The Supreme Court solved the conflict in the instant cases in favor of the first group of courts; their opinion is represented by the decisions of the Seventh Circuit.[29] The majority of the Court held that transfer to a district "where the action might have been brought" means a district of statutory venue where the plaintiff had a *right* to bring the action in the first instance, and is independent of the wishes of the defendant. The minority emphasized the need for a more extensive application of the section, but they had to resort to judicial legislation rather than to a construction of the existing statute, as will be shown in the following observations.

It is a well recognized principle of construction that all of the language used in a statute is deemed to have been intentionally used and the courts should endeavor to make every part effective and sensible.[30] Furthermore, words used in statutes should be given their plain and ordinary meaning rather than an artificial one.[31] The controversial words would become superfluous if they were to be given the meaning which the defendants and the minority of the Court attribute to them. According to that construction transfer of a civil action could be made upon motion of the defendant *to any district for the convenience of the parties and witnesses, in the interest of justice*. Thus, the limiting words "where action might

[27] General Electric Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (W.D. Mo. 1955); Tivoli Realty v. Paramount Pictures, Inc., 89 F. Supp. 278 (D. Del. 1950); Felchlin v. American Smelting & Refining Co., 136 F. Supp. 577 (S.D. Cal. 1955).

[28] Anthony v. Kaufman, 193 F.2d 85 (2d Cir. 1951); *Ex parte* Blaski, 245 F.2d 737 (5th Cir. 1957); Paramount Pictures, Inc. v. Rodney, 186 F.2d 111 (3rd Cir. 1951). The discussion is limited to the facts of the cases noted where the defendant is the moving party. The question raised in cases where the plaintiff moves for transfer would deserve special consideration in view of the fact that he had chosen his forum; he might not generally use the statute for the purpose of evading the provisions limiting process of service to the territorial boundaries of the state where the issuing district court is located. *E.g.*, Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950).

[29] Blaski v. Hoffman, 260 F. 2d 317 (7th Cir. 1958); Behimer v. Sullivan, 261 F. 2d 467 (7th Cir. 1958).

[30] CRAWFORD, THE CONSTRUCTION OF STATUTES 260 (1940).

[31] Blaski v. Hoffman, 260 F. 2d 317, 319 (7th Cir. 1958) (by implication).

have been brought" are in effect deleted from the statute.[32] However, Congress has not chosen to provide in this manner or it would have omitted the phrase.[33] The same or similar words are used in other sections of the same chapter in the Judicial Code under the heading District Courts: Venue.[34] There is no controversy that the words in these sections limit the number of forums available for the institution of actions or suits.[35] A reference to such similar statutory language of uncontroverted meaning supports the construction given to the controversial words by the majority, namely, that the district to which transfer is sought must be one which was a proper forum when the action was *commenced*. The Court correctly rejected the artificial interpretation by the minority that the wishes of the defendant at the time of transfer could change the tense of the section to read: that transfer is permitted to any district where action could *now* be brought with the consent of the defendant.[36]

The minority further emphasized that a venue statute "merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election."[37] But does this justify the conclusion that by waiving his privilege the defendant may *create* a proper venue over the objections of the plaintiff? The majority of the Court answered in the negative, and it appears to be supported by sound reason. The Court stated:

> Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it. . . . But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action "might have been brought" by the plaintiff. . . .[38]

The terms "waiver of objections to venue" and "consent to submit to a court's jurisdiction" traditionally presuppose a forum with jurisdiction

[32] General Electric Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (W.D. Mo. 1955).

[33] Paramount Pictures, Inc. v. Rodney, 186 F. 2d 111 (3rd Cir. 1950) (dissenting opinion).

[34] Examples of such similar language are found in 28 U.S.C.A. §§ 1391, 1396: "[A] civil action . . . may be brought"; § 1393: ". . . civil action . . . must be brought . . ."; § 1398: ". . . [A]ny civil action . . . shall be brought. . . ."

[35] Paramount Pictures, Inc. v. Rodney, 186 F.2d 111, 116 (3rd Cir. 1950).

[36] Hoffman v. Blaski, 363 U.S. 335, 343 (1960).

[37] Hoffman v. Blaski, *supra* note 36 at 360.

[38] *Id.* at 343-44.

over the subject matter and selected by the plaintiff.[39] Section 1404(a) was enacted to give the defendant "more of an equal standing with the plaintiff."[40] It had its origin in the doctrine of *forum non conveniens*, which doctrine was developed for the protection of the defendant from suit in an inconvenient forum. This historical background does not justify the view of the minority in the instant cases, which view would enable the defendant to use this section to become the aggressor, in forcing the trial into a forum which the plaintiff could not have chosen, and for which the venue statutes do not provide.

The contention of Mr. Justice Frankfurter was that the construction by the majority of the Court would unnecessarily impede the judicial administration. The section should be construed to expand rather than restrict the court's discretion to transfer in the interest of justice and convenience. However, the words in dispute have no reference to the question of the *discretion* of the transferor court.[41] They merely refer to the *power* of the court to transfer to another forum; discretion enters into the court's consideration only after another forum is found to exist. The limitation imposed by the statute must be respected by the courts. If an expansion in the number of forums becomes necessary, it is for Congress to change that existing statute.

The instant decision has put an end to the controversy regarding the proper construction of the last clause of section 1404(a). The transferee court must be one of statutory venue at the time the action was originally brought; a "waiver" of objections by the defendant does not create a proper venue by virtue of his consent. However, the dissenting opinion might give rise to a re-examination of the usefulness of the existing statute. Upon a finding that justice would be better served by deleting the limiting words, Congress might redraft the section and permit a transfer of a civil action from one district to any other district in the interest of justice and for the convenience of witnesses and parties. On the other hand, the warning of Mr. Justice Black in his dissenting opinion to the *Gulf Oil* decision[42] should be heeded: "[A]ny individual or corporate defendant who does part of his business in states other than the one in which he is sued will almost invariably be put to some inconvenience to defend himself."[43]

[39] Such was the case in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939). This decision is generally cited as standing for the proposition that venue is a personal privilege of the defendant and may be waived.

[40] KAUFMAN, *Observations on Transfer under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595, 603 (1959).

[41] Hoffman v. Blaski, 363 U.S. 335, 340 (1960).

[42] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[43] *Id.* at 515–16.

If the limitation on the courts' transfer power is relaxed, the very threshold of the federal courts will be "cluttered" with preliminary trials of fact concerning the relative convenience of forums.[44] This might produce the very kind of uncertainty, hardship, and delay which the minority in the instant cases sought to avoid.

[44] *Ibid.*

FEDERAL TAXATION–U.S. SUPREME COURT RULES ON USEFUL LIFE AND SALVAGE VALUE

On the same day the United States Supreme Court considered three federal taxation cases concerning the points of useful life and salvage value. In the first case, petitioner was engaged in the business of leasing and renting trucks and automobiles. The average holding period of the trucks was thirty-nine months, and the automobiles were held for an average of twenty-six months. J. Frank Connor, former owner, claimed depreciation on a four year useful life using the straight line method for the trucks and a hybrid method for the automobiles for the fiscal years ending March 31, 1954, 1955, and 1956. Petitioner, successor to Connor, filed amended income tax returns for the above stated years using the declining balance method of depreciation, and claiming a refund. The Commissioner disallowed the amended returns and this was upheld by the Supreme Court of the United States. The Court held that the automobiles did not have a useful life of three years, required under section 167 (c) of the 1954 Internal Revenue Code,[1] and that therefore, the declining balance method of depreciation could not be employed. Although the Court found the trucks to have the required useful life, it held that they did not have a reasonable salvage value as required by Treasury Regulation section 1.167 (b)-2.[2] (The district court had previously held that useful life is the period of use to a taxpayer in his trade or business and that salvage value is inherent in the declining balance method.) *Hertz Corp. v. United States*, 346 U.S. 122 (1960).

In the second case, taxpayers were engaged in the business of leasing new automobiles. In the years 1950 and 1951, they leased numerous automobiles to Evans U-Drive, Inc., who in turn leased to the public. Taxpayers claimed depreciation over a useful life of four years with no

[1] Int. Rev. Code of 1954, § 167(c): "Paragraphs (2), (3), and (4) of subsection (b) shall apply only in the case of property . . . with a useful life of 3 years. . . ."

[2] Treas. Reg. § 1.167 (b)–2 (1956) provides: "Declining balance method– (a) Application of method–. . . . While salvage is not taken into account in determining the annual allowances under this method, in no event shall an asset (or an account) be depreciated below a reasonable salvage value. . . ."